958b

Supreme Court, U.S.
FILED
APR 10 2007
OFFICE OF THE CLERK

Nos. 06-340 and 06-549

In the Supreme Court of the United States

NATIONAL ASSOCIATION OF HOME BUILDERS, ET AL.,
PETITIONERS

v.

DEFENDERS OF WILDLIFE, ET AL.

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

DEFENDERS OF WILDLIFE, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER ENVIRONMENTAL PROTECTION AGENCY

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

Page

A. The court of appeals' decision is erroneous 1
   1. The responsible federal agencies' interpretation of Section 7(a)(2) of the ESA is consistent with the statutory text and structure 2
   2. Respondents' reliance on *TVA* v. *Hill* is misplaced 11
   3. Respondents' position is inconsistent with the development of Section 7 of the ESA since its original enactment 12
B. A remand for further administrative proceedings is unwarranted 15

TABLE OF AUTHORITIES

Cases:

Babbitt v. *Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687 (1995) 4
Bennett v. *Spear*, 520 U.S. 154 (1997) 4
Bulova Watch Co. v. *United States*, 365 U.S. 753 (1961) 5
Clinton v. *City of New York*, 524 U.S. 417 (1998) 12
Department of Transp. v. *Public Citizen*, 541 U.S. 752 (2004) 3, 4, 17
Lincoln v. *Vigil*, 508 U.S. 182 (1993) 12
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 (1974) 18
Protect Our Water v. *Flowers*, 377 F. Supp. 2d 844 (E.D. Cal. 2004) 6
TVA v. *Hill*, 437 U.S. 153 (1978) 11, 12, 14

Cases—Continued: Page

Townsend v. *Little*, 109 U.S. 504 (1883) 5
Train v. *City of New York*, 420 U.S. 35 (1975) 12
United States v. *United Cont'l Tuna Corp.*, 425 U.S. 164 (1976) 4
Watt v. *Alaska*, 451 U.S. 259 (1981) 4

Statutes and regulations:

Endangered Species Act, 16 U.S.C. 1531 *et seq.*:
16 U.S.C. 1532(3) 6
16 U.S.C. 1536 (1976) (§ 7) 13, 14
16 U.S.C. 1536 (§ 7) 7, 11, 12, 13
16 U.S.C. 1536(a)(1) (§ 7(a)(1)) 5, 6, 7, 13, 14
16 U.S.C. 1536(a)(2) (§ 7(a)(2)) ..... *passim*
16 U.S.C. 1536(b)(3)(A) 7
16 U.S.C. 1536(g) (§ 7(g)) 7
16 U.S.C. 1536(g)(3)(A)(i) 7
16 U.S.C. 1538 (§ 9) 4
16 U.S.C. 1538(a) 4
Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1251 *et seq.*:
33 U.S.C. 1311 8
33 U.S.C. 1311(b)(1)(C) 8
33 U.S.C. 1313(c) 8
33 U.S.C. 1314(i) 8
33 U.S.C. 1342(b) (§ 402(b)) 1, 2, 3, 4, 8
33 U.S.C. 1342(b)(1)(A) 8
33 U.S.C. 1342(d)(4) 11

Statute and regulations–Continued: Page

National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 3

40 C.F.R.:

Section 35.162(b)(1)(i) 18
Section 123 9
Section 123.27 8
Section 123.61(a)(1) 18
Section 123.61(b) 18

50 C.F.R.:

Section 402.02 ..... 7, 10
Section 402.03 ..... 9, 10

Miscellaneous:

119 Cong. Rec. 42,913 (1973) 14

In the Supreme Court of the United States

No. 06-340

NATIONAL ASSOCIATION OF HOME BUILDERS, ET AL., PETITIONERS

v.

DEFENDERS OF WILDLIFE, ET AL.

No. 06-549

ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

DEFENDERS OF WILDLIFE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER ENVIRONMENTAL PROTECTION AGENCY

A. The Court Of Appeals' Decision Is Erroneous

Our opening brief explains (at 17-29) that Section 7(a)(2) of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1536(a)(2), construed in accordance with established principles of legal causation, applies only to discretionary agency conduct. Section 7(a)(2) therefore does not supersede the requirement of Section 402(b) of the Federal Water Pollution

Control Act Amendments of 1972 (Clean Water Act or CWA), 33 U.S.C. 1342(b), that the Environmental Protection Agency (EPA) "shall approve" a State's application for transfer of National Pollutant Discharge Elimination System (NPDES) permitting authority when specified criteria concerning the State's legal authority to administer the NPDES program are satisfied. Section 402(b) specifies nine criteria that a State must satisfy before EPA *shall* transfer authority to the State. The ESA should not—and need not—be read as adding a tenth criterion to the State's burden. Our opening brief further explains (at 29-38) that the language of Section 7 of the ESA as originally enacted in 1973, and the circumstances under which Section 7 was amended to its current form in 1978 and 1979, reinforce the conclusion that Section 7(a)(2) is limited to an agency's discretionary decisions in utilizing its authorities and does not supersede mandatory statutory duties. Respondents fail to refute those arguments.

1. The responsible federal agencies' interpretation of Section 7(a)(2) of the ESA is consistent with the statutory text and structure

a. Section 7(a)(2) of the ESA requires EPA to "insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2). Respondents contend (Br. 34) that the position taken by the responsible federal agencies in this case is inconsistent with the "plain language" of Section 7(a)(2). That is incorrect.

Respondents argue (Br. 34) that the approval of Arizona's application for transfer of NPDES permitting authority falls within Section 7(a)(2)'s definition of "agency action" as an action "authorized" by EPA. It is far more natural, however,

to say that the transfer was "authorized" (indeed mandated) *by Congress*, which directed that state applications "shall" be approved if they satisfy the CWA criteria (see 33 U.S.C. 1342(b)), rather than by EPA, which simply obeyed that statutory mandate. Cf. 06-549 Pet. App. 65a (Thompson, J., dissenting); Gov't Br. 25 n.7. That reading of the term "authorized" is consonant with the general thrust of Section 7(a)(2), which imposes no overarching duty on federal agencies to protect listed species from harms caused by other actors, but focuses on impacts attributable to the agency itself. See *id.* at 22 & n.6.

Even if the approval of Arizona's transfer application were properly regarded as a federal "agency action" within the meaning of Section 7(a)(2), established principles of legal causation make clear that the approval did not "jeopardize" any listed species. Our opening brief explains (at 21, 25), and respondents do not dispute, that the word "jeopardize" in Section 7(a)(2) means "cause jeopardy to." That phrase logically suggests a requirement of proximate or legally relevant cause. Because the CWA required EPA to approve Arizona's transfer application once it determined that the CWA criteria were satisfied, Congress's action, not EPA's, was the "legally relevant cause" of any harm to listed species that might occur after the transfer. See *Department of Transp.* v. *Public Citizen*, 541 U.S. 752, 769 (2004). EPA's approval therefore did not "jeopardize" the continued existence of any such species.

Respondents contend (Br. 48-49) that *Public Citizen* is inapposite here because that case involved a statute (the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*) that imposes solely procedural requirements upon federal agencies. Respondents are correct that the substantive no-jeopardy mandate imposed by Section 7(a)(2) of the ESA has no analog in NEPA. The Court in *Public Citizen*, however, did not limit its causation analysis to purely

procedural laws, but held more generally that, "where an agency has no ability to prevent a certain effect due to its limited statutory authority over the relevant actions, the agency cannot be considered a legally relevant 'cause' of the effect." 541 U.S. at 770. That holding logically requires the conclusion under the ESA that conduct mandated by another federal statute cannot "jeopardize" a listed species. Cf. *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 696-697 n.9 (1995) (holding that "ordinary requirements of proximate causation and foreseeability" govern the application of the ESA's prohibition of "take[s]" of listed species, see 16 U.S.C. 1538(a)).[1]

The conclusion that follows from the statutory text—that Section 7 of the ESA does not supersede the mandatory and exclusive directive contained in Section 402(b) of the CWA—is reinforced by the settled principle that "repeals by implication are not favored," and "[t]he intention of the legislature to repeal must be clear and manifest." *Watt* v. *Alaska*, 451 U.S. 259, 267 (1981) (citations and internal quotation marks omitted); see Gov't Br. 19-21. That "principle carries special weight when [the Court is] urged to find that a specific statute has been repealed by a general one." *United States* v. *United Cont'l Tuna Corp.*, 425 U.S. 164, 169 (1976). The carefully tailored CWA provisions at issue here, which speak precisely to the transfer of NPDES permitting authority and reflect

---

[1] Amici American Bird Conservancy, et al., contend (Br. 28-30) that, if the Section 7 consultation process is inapplicable to agency conduct that is required by another Act of Congress, federal officials who implement the pertinent statutory directive may be liable for any resulting "take[s]" of listed species in violation of Section 9 of the ESA, 16 U.S.C. 1538. That concern is unwarranted. Because (as explained in the text) the "take" prohibition itself is properly construed to incorporate established causation principles, federal officials would not be liable for any takes that might result from their compliance with other Acts of Congress. See *Bennett* v. *Spear*, 520 U.S. 154, 173-174 (1997).

sensitivity to the federalism concerns that the allocation of such power entails, are clearly more specific to the instant circumstances than is the general no-jeopardy provision applicable to all federal agencies under Section 7(a)(2) of the ESA.

Congress, having specified nine criteria relevant to the specific transfer of authority, should not lightly be construed to have added a tenth when it enacted the ESA. And, given the federalism-sensitive nature of the CWA provisions governing transfer of NPDES permitting authority, it would be especially anomalous to add as a tenth criterion a requirement that state permitting officials be effectively made subject to the no-jeopardy duty in Section 7(a)(2) of the ESA—a provision that Congress carefully limited to agencies of the federal government. Indeed, even if the relevant provisions of the ESA and CWA were irreconcilably in conflict, respondents are incorrect in stating (Br. 45 n.16) that the ESA would control as the later-enacted statute. To the contrary, "it is familiar law that a specific statute controls over a general one 'without regard to priority of enactment.'" *Bulova Watch Co.* v. *United States*, 365 U.S. 753, 758 (1961) (quoting *Townsend* v. *Little*, 109 U.S. 504, 512 (1883)); see Gov't Br. 18-19.

b. Section 7(a)(1) of the ESA directs federal agencies to "utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened species." 16 U.S.C. 1536(a)(1). Respondents contend (Br. 37-38) that "the section 7(a)(1) duty to 'conserve' listed species necessarily *subsumes*" Section 7(a)(2)'s no-jeopardy mandate, and that the latter requirement will therefore be rendered "surplusage" unless Section 7(a)(2), unlike Section 7(a)(1), is read to encompass conduct in which a federal agency is legally required to engage. That argument lacks merit.[2]

---

[2] Respondents also attach significance (see Br. 36-37) to the fact that Section 7(a)(1) contains the phrase "utilize their authorities" and Sec-

Respondents are correct that the "conservation" requirement imposed by Section 7(a)(1) extends beyond the duty not to "jeopardize" the continued existence of a listed species. See 16 U.S.C. 1532(3) ("The terms 'conserve', 'conserving', and 'conservation' mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary."). And the former requirement does "subsume" the latter—in the sense that avoiding "jeopard[y]" to listed species as required by Section 7(a)(2) is one way for agencies to "utilize their authorities" to further the purposes of the Act. See Gov't Br. 32. But the key to reconciling the provisions lies not in expanding Section 7(a)(2) to encompass statutory mandates, but in recognizing that the obligations attach at different levels of agency action.

Section 7(a)(1) imposes only a general programmatic obligation: it directs each federal agency to make *some* meaningful effort to conserve listed species, but it does not require that *every* action by the agency achieve a conservation purpose. See *Protect Our Water* v. *Flowers*, 377 F. Supp. 2d 844, 870 (E.D. Cal. 2004) ("By its terms, section 7(a)(1) applies to agency programs, not individual agency actions."). Section 7(a)(2)'s no-jeopardy mandate, by contrast, applies to every individual action that is properly attributed to a federal agency under the causation principles discussed above. An agency could comply with its generalized obligations under Section 7(a)(1) even if a particular action would run afoul of Section 7(a)(2). Thus, Section 7(a)(2) imposes a significant obligation that Section 7(a)(1) does not, even though neither provision overrides mandates or constraints placed on agency discretion by other Acts of Congress.

---

tion 7(a)(2) does not. We address that point at pp. 12-15, *infra*.

c. Contrary to respondents' contention (Br. 41-43), the inclusion of an exemption procedure in Section 7 does not suggest that the requirements of Section 7(a)(2) apply even where an agency is acting pursuant to an express statutory directive. An applicant for an exemption must show, *inter alia*, that it has "carried out [its] consultation responsibilities * * * in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2) of this section." 16 U.S.C. 1536(g)(3)(A)(i). The statutory provisions governing the consultation process make clear, however, that the "reasonable and prudent alternatives" presented for the agency's consideration must be measures that "can be taken by the Federal agency." 16 U.S.C. 1536(b)(3)(A). Such measures would not include an alternative course of conduct that is forbidden by federal law. See 50 C.F.R. 402.02 (defining "reasonable and prudent alternatives" to mean measures "that can be implemented consistent with the scope of the Federal agency's legal authority and jurisdiction"). Thus, under respondents' position, an applicant for an exemption under Section 7(g) of the ESA, 16 U.S.C. 1536(g), must exhaust a consultation process that is unsuited to situations in which the agency action is mandated by another Act of Congress. Far from supporting respondents' position, the ESA's exemption provisions reinforce the conclusion that Section 7(a)(2) is simply inapplicable to agency conduct that is required by another Act of Congress.

d. Respondents contend (Br. 44) that, because the CWA and ESA serve complementary objectives, EPA should have "use[d] the section 7 consultation process to devise reasonable methods for ameliorating post-transfer impacts on federally listed species." It is true that, under some circumstances, EPA's application of the CWA criteria governing state trans-

fer applications (*e.g.*, the requirement that the State demonstrate its authority to issue permits that ensure compliance with applicable water quality standards, see 33 U.S.C. 1311(b)(1)(C), 1342(b)(1)(A) (incorporating 33 U.S.C. 1311)) may incidentally benefit species listed pursuant to the ESA. And if a person believed that the responsible state agency would lack the authority under state law to administer such standards effectively, the person could seek judicial review of the transfer decision on that ground. The dispositive question in such a case, however, would be whether EPA, in granting the State's application, had arbitrarily determined that the *CWA* criteria were satisfied—not whether the approval satisfied distinct requirements purportedly imposed by the ESA.[3]

No issue of CWA compliance is raised in the instant case because it is undisputed that Arizona's transfer application satisfied the prerequisites established by that statute. See 06-549 Pet. App. 31a n.11; Gov't Br. 18; Resp. Br. 19 n.8. The CWA's directive that EPA "shall approve" a conforming application, 33 U.S.C. 1342(b), is therefore controlling. The generally complementary purposes of the ESA and CWA pro-

---

[3] In acting on a State's application for transfer of NPDES permitting authority, EPA considers, *inter alia*, whether the State possesses the legal authority and resources to enforce applicable water quality standards. See 33 U.S.C. 1342(b)(1)(A) (referring to 33 U.S.C. 1311); 33 U.S.C. 1314(i); 40 C.F.R. 123.27. EPA's evaluation of the transfer application, however, does not require scrutiny of the water quality standards themselves, which EPA approves through a separate process under 33 U.S.C. 1313(c). Under that separate process, when a State requests approval of new or revised water quality standards, EPA consults with the Fish and Wildlife Service and/or the National Marine Fisheries Service concerning that request if it determines that the proposed standards may affect species listed under the ESA. See 06-340 Pet. App. 263-264.

vides no basis for EPA to countermand that unambiguous statutory command.[4]

e. A regulation adopted jointly by the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) in 1986 states that "Section 7 and the requirements of [50 C.F.R. Pt. 402] apply to all actions in which there is *discretionary* Federal involvement or control." 50 C.F.R. 402.03 (emphasis added). Respondents contend (Br. 46-47) that, because application of the CWA criteria requires some exercise of judgment, EPA's transfer decision is subject to "discretionary Federal involvement or control" within the meaning of the regulation. That argument lacks merit. Although EPA's evaluation of the CWA factors is not a purely mechanical inquiry, EPA lacks discretion to look beyond those factors or to deny a State's application where (as here) the CWA criteria are satisfied. To the extent that 50 C.F.R. 402.03 is otherwise ambiguous, FWS and NMFS have recently confirmed that they construe the regulatory phrase "discretionary Federal involvement or control" not to encom-

---

[4] Respondents suggest (Br. 29-30) that EPA's decision to fund Arizona's program implicated Section 7(a)(2) even if the approval of the transfer application, standing alone, did not. EPA's provision of grant money to state water-pollution-control programs, however, is independent of the decision whether to transfer NPDES permitting authority to state officials and is governed by different regulatory criteria. Compare 40 C.F.R. 35.162(b)(1)(i) (criteria governing EPA funding for state programs do not include prior approval of NPDES transfer application for the relevant State), with 40 C.F.R. 123 (EPA regulation governing state NPDES programs). Indeed, we are informed that Arizona had received EPA funding for water-pollution-control efforts for some years before its NPDES transfer application was granted. Respondents have not separately challenged EPA's funding decision, and any effort to contest the provision of federal money to the State would raise difficult questions of causation and redressability that the court below had no occasion to address. EPA's decision to approve the transfer therefore is the sole focus of judicial review in this case.

pass EPA's authority to grant or deny a State's NPDES transfer application. See 06-549 Pet. App. 109a-110a, 114a-115a; Gov't Br. 14, 37.[5]

Respondents also contend (Br. 45-46) that this Court should not consider 50 C.F.R. 402.03 because the agencies did not invoke the regulation during the administrative proceedings in this case. The private intervenors (petitioners in No. 06-340) relied on the regulation, however, and the court of appeals announced its own construction of the rule. See Gov't Br. 38 n.13. In any event, the legal-causation rationale set forth in the FWS biological opinion (BiOp), which also is embodied in the definition of "effects of the action" in 50 C.F.R. 402.02 (see Gov't Br. 5-6), and the requirement of "discretionary Federal involvement or control" in 50 C.F.R. 402.03, are simply different ways of expressing the same principle—*i.e.*, that an agency can "jeopardize" listed species only through conduct in which it *chooses* to engage.[6]

---

[5] Amici American Bird Conservancy, et al., construe 50 C.F.R. 402.03 to mean no more than that "Section 7(a)(2) applies broadly to all yet-to-be completed federal actions," as distinct from actions in which prior federal involvement has terminated. Br. 13; see Br. 9-13. Like the court of appeals' construction of Section 402.03, however, the interpretation proffered by amici reads the word "discretionary" out of the rule. Cf. Gov't Br. 36-37. Certainly an activity in which the federal role has concluded would be *one* example of an action lacking "discretionary Federal involvement or control." In addition, however, the regulation is naturally read to exclude activities in which a federal agency continues to participate if the terms of its involvement are dictated by Congress.

[6] Noting that "EPA's transfer decision * * * triggers a continuing duty on it to oversee the administration of the state program," amici American Bird Conservancy, et al., argue (at 25) that "[c]onsultation between EPA and [FWS or NMFS] at the time of transfer can and should explore how EPA will exercise its oversight and permit objection authorities." Although EPA, in the course of its discretionary oversight, may in some circumstances issue an NPDES permit in a State

2. *Respondents' reliance on* TVA *v.* Hill *is misplaced*

Contrary to respondents' contention (Br. 38-41), this Court in *TVA* v. *Hill*, 437 U.S. 153 (1978), did not suggest that the ESA's no-jeopardy requirement overrides constraints or mandates contained in other Acts of Congress. The government's principal contention in *Hill* was that the ESA did not prohibit completion of the Tellico Dam because that project had been planned and largely finished before the ESA's enactment in 1973 and the listing of the snail darter as an endangered species in 1975. See Gov't Br. at 19-21, 23-34, *Hill*, *supra* (No. 76-1701). This Court's rejection of that retroactivity argument, see 437 U.S. at 173-174, 184-188, has no bearing on the question presented here.

The government in *Hill* also argued (see Br. 21-23, 34-46) that federal appropriations laws enacted during the pendency of the snail-darter controversy reflected Congress's intent that the Tellico Dam should go forward. In rejecting that contention, the Court did not hold (as respondents' position here would suggest) that Section 7 of the ESA would have prohibited completion of the dam even if the appropriations Acts had expressly required that result. Rather, the Court explained that the relevant Acts had appropriated lump-sum amounts for the agency but had not specified the uses to which the money would be put. See 437 U.S. at 189 & n.35. While acknowledging that the pertinent House and Senate Reports had expressed a preference for the dam's completion,

---

with an authorized program (see 33 U.S.C. 1342(d)(4)), that does not mean that the transfer decision is itself discretionary. And the possibility that EPA may some day take an action for which it would be required to consult in exercising its discretionary oversight of Arizona's program (*e.g.*, when issuing an NPDES permit that may affect a listed species) provides no basis for setting aside a transfer approval that the CWA *required* EPA to issue.

see *id.* at 189, the Court observed that "[e]xpressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress," *id.* at 191. The clear implication of the Court's decision was that Section 7 of the ESA would not preclude an agency from taking action that—like the transfer of NPDES permitting authority at issue here—*is* expressly required by another federal statute. The Court's observation that those expressions emanated from committee reports rather than from the statute would have been irrelevant if Section 7 had the extraordinary scope respondents attribute to it.[7]

3. Respondents' position is inconsistent with the development of Section 7 of the ESA since its original enactment

Our opening brief explains (at 29-30) that, under Section 7 of the ESA as originally enacted in 1973, the obligations of

---

[7] Respondents contend (Br. 39 n.14) that *Hill* was like this case because the TVA had no discretion to decline to spend the funds appropriated for the Tellico Dam. As a legal matter, however, lump-sum appropriations leave the ultimate expenditure of the amounts appropriated to the discretion of the agency. See *Lincoln* v. *Vigil*, 508 U.S. 182, 192-193 (1993); see also *Clinton* v. *City of New York*, 524 U.S. 417, 446, 448 n.43 (1998). By contrast, *Train* v. *City of New York*, 420 U.S. 35, 43-48 (1975), upon which respondents rely, involved, not a lump-sum appropriation, but a statute the Court construed to *require* the allocation of the funds. Moreover, even assuming, arguendo, that the TVA was obligated to spend the entirety of the appropriations, nothing in the text of the relevant Acts required the agency to spend money *on the Tellico Dam*. While the government did contend in *Hill* that Congress's intent to constrain the TVA's discretion was fairly discernible from the legislative history of the pertinent appropriations Acts, the Court's holding there that the statutes themselves did not impose any such obligation does not cast doubt on EPA's view of its current responsibilities under the CWA, which rests squarely on the text of the enacted law.

federal agencies to carry out conservation programs (now contained in Section 7(a)(1)) and to avoid jeopardy (now contained in Section 7(a)(2)) were *both* directed towards the agency's existing powers by the phrase "utilize their authorities." Our opening brief further explains (at 31-33) that the circumstances under which Section 7 was amended in 1978 and 1979 belie any possible inference that Congress, by omitting the phrase "utilize their authorities" from current Section 7(a)(2), intended to expand the coverage of the ESA's no-jeopardy requirement. Respondents appear to recognize (see Br. 35-37) that the phrase "utilize their authorities" in Section 7(a)(1) reflects Congress's intent that agencies should conserve listed species only to the extent that they are permitted to do so under other provisions of law. Respondents entirely fail, however, to address the implications of that point for the proper interpretation of Section 7(a)(2).

a. Relying on the 1973 legislative history, respondents contend that the enacting Congress viewed the prohibition against jeopardy as imposing a further duty that "goes beyond" Section 7's conservation requirement, and that Congress used the phrase "utilize their authorities" selectively in order to distinguish between the two. See Resp. Br. 37 n.13. Because the conservation requirement is a generalized programmatic obligation, while the no-jeopardy requirement applies to *every* action properly attributable to a federal agency, the latter duty is a particularized aspect of the former, not a wholly distinct requirement, as respondents contend. See pp. 5-7, *supra*. Moreover, the 1973 legislative history is a most implausible source for an explanation for Congress's selective use of the phrase "utilize their authorities" because *both* duties were qualified by the phrase "utilize their authorities" under Section 7 as originally enacted in 1973.

b. Respondents contend (Br. 41-43) that, in amending Section 7 of the ESA in 1978, Congress intended generally to

ratify this Court's decision in *Hill* while giving federal agencies the possibility of some relief from Section 7's no-jeopardy requirement through the creation of the Endangered Species Committee. Respondents further assert (Br. 42) that, "rather than respond to *Hill* by qualifying the jeopardy prohibition with the kind of limiting language in section 7(a)(1), Congress reenacted the prohibition without any such restriction." But the no-jeopardy requirement was *already* qualified by the phrase "utilize their authorities."[8] There was accordingly no need for Congress to change the statute (or to overrule or modify *Hill*) in order to provide that the jeopardy prohibition applies only to matters within federal agencies' existing authority. Moreover, even respondents do not suggest that Congress "responded" to *Hill* by expanding the no-jeopardy provision to encompass agency actions directly mandated by Congress. Thus, given that Section 7 of the pre-1978 ESA expressly tied the no-jeopardy mandate to the "utilize their authorities" language, respondents' apparent recognition that the 1978 Congress was content with the existing scope of the no-jeopardy requirement cuts against rather than in favor of their position.

c. While arguing that current Section 7(a)(2) unambiguously covers agency conduct mandated by another Act of Congress, respondents do not make clear *when* they believe the ESA's no-jeopardy requirement came to have that broad scope. Any contention that Section 7 of the 1973 law had that

---

[8] The Court in *Hill* was fully aware of this fact, as evidenced by the reproduction of the full text of Section 7 in its opinion (see 437 U.S. at 160), by its quotation of the statement by Representative Dingell that Section 7 requires agencies to take steps "within their power" to carry out the purposes of the Act (*id.* at 183 (quoting 119 Cong. Rec. 42,913 (1973))), and by the fact that the only references to agency practices that would be altered by Section 7 were to conduct within the agencies' discretionary authority (*id.* at 183-184, 185-186 n.31, 186-187).

coverage would be inconsistent with the fact that the no-jeopardy requirement was qualified at that time by the phrase "utilize their authorities"—language that respondents themselves agree reflects Congress's intent that federal agencies pursue the ESA's objectives only to the extent permitted by other provisions of law. But any suggestion that the coverage of the no-jeopardy requirement was broadened by the 1978 (or 1979) ESA amendments is both implausible on its own terms (see Gov't Br. 31-34) and inconsistent with respondents' assertion that Congress ratified the decision in *Hill*.

B. A Remand For Further Administrative Proceedings Is Unwarranted

Respondents contend (Br. 22-32) that this case should be remanded for further agency proceedings. That disposition is unwarranted. As our opening brief explains (at 9, 43), the FWS BiOp, on which EPA relied in its final decision, set forth a legally sufficient rationale for FWS's ultimate no-jeopardy conclusion. The BiOp found that any harm to listed species that might occur after the transfer of permitting authority "is not caused by EPA's decision to approve the State of Arizona's program," but instead "reflects Congress' decision to grant States the right to administer these programs under state law provided the State's program meets the requirements of 402(b) of the Clean Water Act." 06-340 Pet. App. 114. That rationale, endorsed by EPA (see *id.* at 564, 565), was sufficiently clear to permit judicial review and was fully consistent with governing legal principles. See Gov't Br. 46-47. In addition, EPA, FWS, and NMFS have recently confirmed their shared view that Section 7(a)(2) of the ESA neither requires nor authorizes EPA to deny a State's application for transfer of NPDES permitting authority if the CWA criteria are satisfied. See *id.* at 13-14, 37-38, 48-49; 06-549 Pet. App. 93a-116a. Under these circumstances, a remand for

further administrative proceedings would serve no useful purpose.

1. Respondents suggest (Br. 22-23) that the government has acquiesced in the court of appeals' holding that internal inconsistencies in EPA's reasoning rendered the agency's final decision arbitrary and capricious. Respondents misapprehend the point made in the government's opening brief. EPA failed to appreciate during the administrative proceedings that, because the consultation requirement in Section 7(a)(2) is ancillary to and in aid of the no-jeopardy requirement, EPA was not obligated to consult with FWS concerning the effects on listed species of an administrative decision that was compelled by the CWA. EPA's failure to follow the implications of the CWA's mandatory language to their full logical conclusion did not render its approval of the transfer application arbitrary and capricious, however, because the agency's failure to take that further step neither influenced the approval decision nor obscured the agency's basic rationale. See Gov't Br. 44-48.[9]

2. Respondents contend (Br. 17-18, 24 n.9) that EPA's decision was arbitrary and capricious because the FWS BiOp's legal-causation rationale was inconsistent with the BiOp's statement that "[r]egarding causation, the FWS uses the 'but for' test." 06-340 Pet. App. 112. That is incorrect. FWS's analyses of "but for" and legal causation reflect *alter-*

---

[9] Respondents state (Br. 23) that "EPA goes so far as to characterize its own decision documents as being based on a 'misstatement of law.'" EPA's final decision document (the *Federal Register* notice that announced the agency's approval of Arizona's transfer application) did *contain* a misstatement of law, to the effect that the consultation process was "required by ESA section 7(a)(2)." 06-340 Pet. App. 73. Respondents' assertion that the decision documents were "based on" that misstatement, however, implies that EPA's final decision would or might have been different if the agency had recognized that consultation was not required. That is plainly not the case. See Gov't Br. 45-46.

native rather than inconsistent grounds for the BiOp's conclusion that approval of the State's transfer application would not be likely to "jeopardize" any listed species.

FWS applied a "but for" causation test in determining whether anticipated future development in Arizona should be treated, as a factual matter, as a consequence of the proposed transfer of permitting authority. FWS concluded that, "[w]hile development may be reasonably certain to occur in the future, EPA's approval action will not cause development." 06-340 Pet. App. 113. The BiOp explained that "[d]evelopments are driven by any number of factors, including but not limited to demand, supply, economics, political decisions, zoning regulations, and financial market stability." *Ibid.* FWS further observed that approval of Arizona's application would "not provide an incentive to develop in the action area, as would a new highway or water line." *Ibid.*

That practical analysis is in no way inconsistent with FWS's *legal* conclusion that any loss of conservation benefit under Section 7 that would occur after the transfer is properly attributed to Congress rather than to EPA. See 06-340 Pet. App. 114. Nor was it inappropriate for FWS to analyze both types of causation in the same BiOp. In stating that "a 'but for' causal relationship is *insufficient* to make an agency responsible for a particular effect under NEPA," *Public Citizen*, 541 U.S. at 767 (emphasis added), this Court did not suggest that "but for" causation is *irrelevant* to NEPA analysis. Similarly under the ESA, the determination whether particular agency conduct is likely to "jeopardize" listed species may entail analysis of both the likely practical consequences of that conduct and whether the agency has the legal authority to alter its behavior.

Even though the legal-causation analysis in this case would have provided an independently sufficient justification for the BiOp's no-jeopardy finding, thus rendering the "but

for" causation analysis unnecessary, FWS cannot be faulted for taking a belt-and-suspenders approach. Thus, if the legal-causation rationale for the no-jeopardy determination in this case is otherwise sound, FWS's additional finding that development levels in Arizona would not likely be affected by a transfer of NPDES permitting authority cannot render EPA's approval decision arbitrary and capricious. The fact that the FWS BiOp analyzed concepts of both "but for" and legal causation therefore provides no basis for setting aside the challenged agency action.

3. Respondents contend that, by endorsing the legal-causation analysis described above after previously stating that it was required to consult on the transfer decision, "EPA is effectively nullifying respondents' rights to participate in administrative proceedings concerning Arizona's application, and particularly respondents' rights under EPA's own regulations to comment on NPDES transfer applications." Resp. Br. 28 (emphasis omitted; citing 40 C.F.R. 123.61(b)). That claim lacks merit. Neither the cited regulation nor background principles of administrative law suggest that the right to comment on proposed agency action includes a right to advance notice of all material aspects of the agency's ultimate chain of reasoning. Cf. *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (explaining that longstanding precedents of this Court "make plain that [an administrative agency] is not precluded from announcing new principles in an adjudicative proceeding and that the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion").

With respect to NPDES transfer decisions in particular, EPA's regulations establish "a comment period of not less than 45 days during which interested members of the public may express their views on the State program." 40 C.F.R. 123.61(a)(1). In this case, members of the public were af-

forded the opportunity to comment (both on endangered-species issues and on all other aspects of Arizona's application) that the regulation contemplates. EPA voluntarily forwarded to FWS all ESA-related comments that it received, see J.A. 229, and it responded to the public comments when it issued its final decision, see J.A. 223-247. Respondents therefore suffered no diminution of their right to participate in the administrative proceedings.

4. Our opening brief explains (at 48-49) that, whether or not a remand for further administrative proceedings would have been appropriate at an earlier stage of this case, it is unwarranted now because the agencies' recent exchange of letters (see 06-549 Pet. App. 93a-116a) has already provided the sort of clarification that a remand might have produced. Respondents contend (Br. 24-27) that this Court cannot consider those materials because they postdate the agency decision under review. That claim lacks merit.

The principle of law on which the government relies in this Court—*i.e.*, that a federal agency cannot properly be regarded as the legal cause of effects that it lacks the legal authority to prevent—is not a "*post hoc* explanation" (Resp. Br. 24) for an agency decision that was initially based on other grounds. To the contrary, the BiOp itself stated that "loss of any conservation benefit is not caused by EPA's decision to approve the State of Arizona's program" but instead "reflects Congress' decision to grant States the right to administer these programs" if the CWA criteria are satisfied. 06-340 Pet. App. 114.[10]

---

[10] In so concluding, FWS endorsed the view of the pertinent EPA regional office that its approval of the State's application was "not the cause of future non-discharge-related impacts on endangered species

The court of appeals appeared to recognize that FWS's no-jeopardy finding, and EPA's subsequent approval of the State's transfer application, were based in substantial part on the legal-causation rationale described above. See 06-549 Pet. App. 25a. The court viewed the agencies' commitment to that causation analysis as suspect, however, because the agencies had declined to endorse the corollary proposition that the consultation need not have occurred at all. See *id.* at 25a-26a. The agencies' recent exchange of letters in connection with Alaska's application reflects a shared understanding that consultation is not legally required in this context. See *id.* at 96a, 107a, 116a; Gov't Br. 48-49. In issuing that further clarification of their legal position, the agencies did not set forth a new rationale for the prior no-jeopardy determination in this case.[11]

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

APRIL 2007

---

from projects requiring State NPDES permits" because, *inter alia*, "section 402(b) of the CWA states that EPA 'shall' approve the State program if it meets certain specified criteria." 06-340 Pet. App. 564, 565.

[11] Our opening brief states (at 7 n.1) that "[t]he Pima pineapple cactus is currently being reviewed to determine whether it is a valid taxonomic entity." We are informed that FWS has now completed its review and has concluded that no change in the listing status of the Pima pineapple cactus is warranted.